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VIA ECF

The Honorable Sidney H. Stein
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: United States v. Nadine Menendez, (S4) 23-cr-490 (SHS)

Dear Judge Stein:

I am writing to Your Honor to follow up on our colloquy with the Court this afternoon about the jury instruction bearing the following title:

COUNTS FIVE AND ELEVEN: DEMANDING, RECEIVING, OR ACCEPTING A BRIBE AS A PUBLIC OFFICIAL (THIRD ELEMENT)

In the draft charge that the Court circulated prior to the charging conference, this was Instruction Number 37, starting on page 55 of the Court's draft, though it may have been renumbered in the version subsequently circulated by the government. The language in question is from the portion of the charge entitled "Official Act." The two sentences on which we are focused are:

Some examples of actions that are *not*, without more, "official acts" are setting up a meeting, talking with a lobbyist or another official, organizing an event, or expressing support for an action, decision, or idea. Without more, those activities do not constitute a "decision" on a "question or matter" and are therefore not "official acts."

Limiting this language to "expressing support," without including "expressing opposition," is, we respectfully submit, legally incorrect, and likely would be read by the jury as suggesting that simply calling and expressing opposition to something is an official act. This would undermine, in a fundamental way, the theory of our defense. Further, limiting this language to an expression of support, without including an expression of opposition, is

contrary to the holdings of both *McDonnell v. United States*, 579 U.S. 550, 136 S. Ct. 2355 (2016), and *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017). The relevant language in *McDonnell* is to the effect that expressing support “does not qualify as a decision or action.” 579 U.S. at 573. Precisely the same rationale applies to an expression of disagreement or opposition. It is not a “decision or action,” any more than is an expression of support. Accordingly, it is respectfully submitted that the instruction should read as follows:

Some examples of actions that are *not*, without more, “official acts” are setting up a meeting, talking with a lobbyist or another official, organizing an event, or expressing support for or opposition to an action, decision, or idea. Without more, those activities do not constitute a “decision” on a “question or matter” and are therefore not “official acts.”

Respectfully submitted,



Barry Coburn